Supreme Court, U.S.
FILED
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OFFICE OF THE CLERK

No._____

IN THE

Supreme Court of the United States

ROBERT M. DAVIDSON and
VANESSA E. KOMAR,

Petitioners

v.

VIVRA INC,
MICHAEL J. MEEHAN,
QUARLES BRADY STREICH LANG LLP,
et al

Respondents

On Petition For Writ Of Certiorari
As to Two Final Judgments of the United States District Court
for the District of Arizona,
Presently In The United States Court of Appeals Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

Before Judgement

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Preface

Pursuant to 28 U.S.C. Section 1651, 28 U.S.C. Section 1254, 28 U.S.C. Section 1291, 28 U.S.C. Section 2101(e), Fed.R.Civ. P. Rule 60 (b), and 62, and Supreme Court Rules 10-14, and 23, this petition seeks *review on writ of certiorari* to the United States Supreme Court of two final judgments of the U.S. District Court (District of Arizona). These judgments each involve identical or closely related questions, which draw in question the validity of Ariz. R. Civ. P., Rule 5.1 (A)(2)(B) and (C), on the ground of being repugnant to the United States Constitution. These judgments by the U.S. District Court are presently on appeal (fully-briefed) to the 9th Circuit U.S. Court of Appeals (9th Circuit Court of Appeals dockets 03-17342 and 04-15304). There is a long-standing split of authority between the circuits regarding *the right to legal counsel in civil lawsuits* which urges review by this Court. Extraordinary circumstances exist which urge review by this Court. Unless this Court restrains the State court proceeding and stays the federal court dismissals pending appeal, the Petitioners will suffer immediate and irreparable injury.

Questions Presented For Review

1. Is Ariz. R. Civ. P., Rule 5.1 (A)(2) (B) and (C) *flagrantly and patently* violative of express constitutional provisions?
2. Is the Prescription Drug User Fee Act, as applied, repugnant to the U.S. Constitution?
3. Should the State court proceeding be enjoined on *federal preemption* grounds?
4. Did the U.S. District Court err when it dismissed CV-03-00110-FRZ and CV-03-00580-FRZ under the abstention doctrine of *Younger v. Harris*?

PARTIES TO THE PROCEEDINGS IN THE UNITED STATES DISTRICT COURT, DISTRICT OF ARIZONA

Petitioners

ROBERT M. DAVIDSON; and
VANESSA E. KOMAR

Respondents

VIVRA INC;
MICHAEL J. MEEHAN;
QUARLES BRADY STREICH LANG LLP;
VIVRA ASTHMA ALLERGY INC;
VIVRA ASTHMA ALLERGY CARE AMERICA OF ARIZONA PC;
MAGELLAN SPECIALTY HEALTH INC;
ALLIED SPECIALTY CARE SERVICES INC;
VIVRA HOLDINGS INC;
TEXAS PACIFIC GROUP INC;
GAMBRO HEALTHCARE INC;
DIALYSIS HOLDINGS INC;
HEALTH TECHNOLOGIES INC;
ALBANY MEDICAL COLLEGE;
JAY GROSSMAN;
EUDICE GROSSMAN;
THOMAS B. EDWARDS;
GAYLE F. PETRILLO;
CHARLES W. OTT;
TIMOTHY G. WIGHTON;
JOHN W. STRACK;
LYNDA L. NESSINGER;
RICHARD M. HASSETT;
JAMES L. SUBLETT; and
LEANNE M. ZUMWALT

NOTICE TO CLERK OF THIS COURT:

It is the Petitioners' belief that VIVRA INC, MAGELLAN SPECIALTY HEALTH INC, and ALLIED SPECIALTY CARE SERVICES INC, no longer have an interest in the outcome of the petition because these defendants ONLY were dismissed from the appeal by mandate of the 9th Circuit Court of Appeals.

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CITATIONS TO OPINIONS AND ORDERS BELOW

1. Order, November 24, 2003, U.S. District Court, Arizona District, Docket No. 56, Civil Case # CV-03-00110-FRZ
2. Order, February 2, 2004, U.S. District Court, Arizona District, Docket No. 9, Civil Case # CV-03-00580-FRZ
3. Minute Entry, In Chambers Ruling, File Stamp Date: April 29, 2004, Pima County Superior Court, Case No. C333954
4. Memorandum Decision, Appeal Dismissed, February 27, 2003, Arizona Court of Appeals, Division Two, Case No. 2 CA-CV 2002-0051
5. Minute Entry of Arizona Supreme Court re: action taken August 8, 2003; ORDERED: Petition for Review to Supreme Court = DENIED. FURTHER ORDERED: Request for Attorneys' Fees [Appellees Grossman] = GRANTED, Arizona Supreme Court Case No. CV-03-0148-PR
6. Certified Copy of 9th Circuit Mandate: case is dismissed as to appellees Vivra Inc., Magellan Specialty Health Inc, and Allied Specialty Care Services LLC f/k/a Allied Specialty Care Services Inc ONLY. U.S. District Court, Arizona District, Case No. CV-03-00110-FRZ, Docket # 61 entered on April 16, 2004.

BASIS FOR JURISDICTION IN U.S. SUPREME COURT

This petition is filed under 28 U.S.C. Section 1651, 28 U.S.C. Section 1254, 28 U.S.C. Section 1257, 28 U.S.C. Section 1291, 28 U.S.C. Section 1292, 28 U.S.C. Section 1257, 28 U.S.C. Section 2101(e), Fed. R. Civ. P. Rule 60 (b), 62 (c), and Supreme Court Rules 10-14, and 23.

Two final judgments sought to be reviewed were entered by the U.S. District Court, District of Arizona, on November 24, 2003 (CV-03-00110-FRZ), and on February 2, 2004 (CV-03-00580-FRZ). This petition is filed under this Court's Rule 10, Rule 11 and 28 U.S.C. Section 2101 (e).

The federal question as to whether the Prescription Drug User Fee Act ("PDFUA") is constitutionally invalid *as applied* is of imperative public importance. The PDUFA has ongoing, direct, and substantial affect upon public health, safety, and interstate commerce. This case and controversy warrants deviation from normal appellate practice and requires immediate determination by this Court.

Recent 9th Circuit decisions conflict with decisions of the 5th Circuit, regarding the *right to retained legal counsel in civil lawsuits*, which provides a compelling reason for granting review on this writ of certiorari.

RELEVANT CONSTITUTIONAL PROVISIONS

The Fifth Amendment of the United States Constitution provides: *"Nor shall [any person] be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation".*

The Sixth Amendment of the United States Constitution provides: *"In all criminal prosecutions, the accused shall enjoy the right...to have the Assistance of Counsel for his defence".*

The Fourteenth Amendment of the United States Constitution provides: *"No state shall deprive any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws".*

Article I, Section 10 (1) of the United States Constitution provides: *"No State... shall pass any... Law impairing the Obligation of Contracts".*

Article I, Section 8 (3) of the United States Constitution provides: *"The Congress shall have the power to regulate commerce...among the several states".*

STATEMENT OF THE CASE

The State court proceeding began when Jay Grossman, M.D. and his spouse Eudice Grossman (referred to collectively as "the Grossmans") filed a Complaint against Robert M. Davidson, M.D. and his spouse

Vanessa E. Komar, R.N. (referred to collectively as "the Davidsons") on July 2, 1999, in Pima County Superior Court (the "State court proceeding"), alleging defamation and intentional infliction of emotional distress. On October 13, 1999, Michael J. Meehan ("MJM"), then of the law firm Meehan and Associates, entered into an attorney-client relationship with the Davidsons in connection with the litigation initiated on July 2, 1999. It was agreed by MJM that he would file compulsory counterclaims of assault and battery (in the workplace) against the Grossmans. It was further agreed that MJM would bring on behalf of the Davidsons, such other legally-cognizable causes of action against the Grossmans, as would be supported by discovery of the nucleus of operative facts from which the state court proceeding arose. On April 28, 2000, the Davidsons counterclaimed with charges of assault and battery.

The Davidsons retained the legal service of the Law Office of Kenneth Joel Haber, P.C. on August 30, 2000, when it had become clear to the Davidsons that they might be getting less than sound legal advice (and less than vigorous legal representation) from their then Counsel of Record in the State court proceeding (Michael J. Meehan, who was then with the firm Meehan & Associates). Kenneth Haber was retained to review the nucleus of operative facts that gave rise to the State court proceeding, and to then opine legally as to whether the Davidsons have (or at minimum, had) a viable federal civil RICO cause of action. On November 20, 2000, Kenneth Haber provided a copy of their "Prosecution Memorandum" to the Davidsons.

This Court may take judicial notice of the Prosecution Memorandum of November 20, 2000, provided by Kenneth Haber to the Davidsons. This is a document of readily verifiable authenticity which provides this Court with prima facie evidence that the Grossmans' filing of the State court proceeding and MJM's filing of the Motion to Withdraw as counsel of record in the State court proceeding, were both motivated by *bad faith*.

On February 1, 2001, MJM, then of the law firm Quarles & Brady Streich Lang ("Q&BSL"), filed Notice of Change of Law Firm in the

State court proceeding. On December 17, 2001, four months before the scheduled trial date in the State court proceeding, MJM and Q&BSL filed Motion to Withdraw as Counsel of Record and Continue Trial in the State court proceeding, citing Ariz. R. Civ. P. Rule 5.1 (A)(2) (B) as statutory authority for their motion to withdraw. On or about January 11, 2002, the Trial Court Ordered that attorney withdrawal and continuance of the State court proceeding is granted. On or about February 11, 2002, the Davidsons (proceeding pro se), filed an interlocutory appeal to the Arizona Court of Appeals citing deprivation of fundamental rights by the Trial Judge's Order of January 11, 2002, including the rights of Due Process and Equal Protection under the 14th Amendment of the U.S. Constitution.

So as to avoid lapsing of relevant statutes of limitations, the Davidsons (again proceeding pro se) filed Plaintiffs' Original Complaint with the U.S. District Court, Arizona District (CV-03-00110-FRZ) on February 19, 2003, under 18 U.S.C. Section 1964 (c) for violations of 18 U.S.C. Section 1962 (b), (c), and (d) and pendent state law claims, for conspiracy to defraud the Davidsons, study subjects, practice patients, and the United States, against 22 named corporate and individual defendants, alleging 21 counts. On April 30, 2003, the Davidsons filed their First Amended Complaint against the same 22 named defendants, alleging 17 counts.

On June 6, 2003, defendants Grossman appeared and filed "Defendants Jay and Eudice Grossman's Motion to Dismiss Pursuant to Rule 8, Federal Rules of Civil Procedure."

On June 17, 2003, *the case was stayed as to Vivra Inc, Magellan Specialty Health Inc, Allied Specialty Care Services* (referred to collectively as the "Magellan defendants") by the filing of the Magellan defendants' Notice of filing Chapter 11 Bankruptcy (Chapter 11 was filed on March 11, 2003, in the U.S. Bankruptcy Court, Southern District of New York).

On July 1, 2003, the U.S. District Court granted the Grossmans' Motion to Dismiss Pursuant to Rule 8 based on the Court's finding

"that the prolixity of the First Amended complaint renders the pleading incomprehensible." The Davidsons were *granted leave to file a Second Amended Complaint upon the lifting of the automatic stay* in compliance with the pleading requirements of the Federal Rules of Civil Procedure and in accordance with the provisions of the court's Order. It was further ordered that Defendants Vivra Inc, Magellan Specialty Health Inc, and Allied specialty Care Services LLC **shall file a Petition to Lift Automatic Stay** *upon a final determination of the bankruptcy proceedings.* It was further ordered that the Davidsons are granted leave to file a Second Amended Complaint in compliance with the pleading requirements of the Federal Rules of Civil Procedure **on or before 30 days from the date of the filing of the Petition to Lift Automatic Stay** and to serve it upon Defendants in accordance with the Federal Rules of Civil Procedure.

The Davidsons were absolutely prevented from filing a Second Amended Complaint in the Federal court proceeding until 30 days after the Magellan defendants filed a Petition to Lift the Automatic Stay. Not only was the Magellan defendants' petition not forth-coming, the Automatic Stay was replaced by a permanent injunction after their Discharge Confirmation in U.S. Bankruptcy Court. Other than filing a Motion for Preliminary Injunctive Relief to the U.S. District Court, the Davidsons had no legal remedy which would allow them to ever file a Second Amended Complaint in the federal court proceeding. Thus, the Trial Judge's Order of July 1, 2003, dismissing the federal court proceeding without prejudice under FRCP Rule 8, had the same effect as a dismissal with prejudice *as to all of the defendants, yet it was not appealable as a final judgment.*

In a Motion for Injunctive Relief to the U.S. District Court on or about October 21, 2003, the Davidsons asserted that the holdings of the Arizona Court of Appeals in Memorandum Decision of February 27, 2003 and Arizona Supreme Court on August 8, 2003, in Denying the Davidsons' Petition for Review, caused irreparable injury to the Davidsons. The Davidsons asked that the State court proceeding be preliminarily stayed and that the interlocutory award of costs and

attorney's fees awarded by the Arizona Court of Appeals and Supreme court be stayed pending final adjudication of the Federal court proceeding. On November 24, 2003, the district court dismissed the case pursuant to Younger v. Harris, 401 U.S. 37 (1971), denied all other pending matters, and ordered that **there be no further filings in the federal case**. On December 1, 2003, the Davidsons timely-filed Notice of Appeal.

The Davidsons filed Plaintiffs' Original Complaint & Application for Injunctive Relief against Defendant Michael J. Meehan and Defendant Quarles & Brady Streich Lang on November 20, 2003, under 28 U.S.C. Section 1331 and 28 U.S.C. Section 1367 for Breach of Fiduciary Duty, Professional Negligence, and Legal Malpractice. MJM and Q&BSL filed Motion to Dismiss on December 22, 2003. The Davidsons responded by filing Objection to Motion to Dismiss on January 13, 2004. MJM and Q&BSL responded by filing Reply to Objection to Motion to Dismiss on January 27, 2004. U.S. District Court Trial Judge Frank R. Zapata, the same trial judge who had previously dismissed the Davidsons' federal cause of action (Davidson et al v. Vivra Inc, et al) under the Younger abstention doctrine, ordered and adjudged on February 2, 2004, that the Motion to Dismiss is Granted in the Davidsons' federal cause of action (Davidson et al v. Meehan et al), again citing the *Younger* abstention doctrine. The Davidsons timely-filed Notice of Appeal on February 10, 2004.

The Davidsons assert that *"the Federal Case (Davidson, et al v. Vivra Inc, et al) is based upon the 'same nucleus of operative facts' as the State Case"*. The Davidsons sought to add additional RICO counterclaims in the state court proceeding after the Trial Judge's dismissal with prejudice (under *Younger* doctrine) of the federal court proceedings, because these additional counterclaims *"arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading."* The Davidsons' counterclaims of assault and battery in the State court proceeding represent two of the Hobbs Act violations alleged in the federal court proceeding. The Davidsons have alleged that these Hobbs Act violations comprise part of the *pattern*

of racketeering activity in the federal court proceeding.

The State court proceeding is presently scheduled for trial on October 13, 2004. This Court may take judicial notice of Minute Order of April 29, 2004, in the State court proceeding. The Minute Entry of April 29, 2004, from the State court proceeding states, *"To allow the extensive proposed amendments to the answer and the counterclaim would greatly prejudice the plaintiffs [the Grossmans] given that the trial date is set for October 13, 2004." "Defendants' [the Davidsons] motion to amend their answer to add counterclaims and parties and defendants' motion to enlarge the time to comply with Rule 26.1 and to extend the discovery deadline are hereby denied."*

Unsigned Minute Entries are not appealable under Arizona law. The State court's denial of the Davidsons' motion to amend their answer to add counterclaims and parties and defendants' motion to enlarge the time to comply with rule 26.1 and to extend the discovery deadline, represents a total denial of a state forum in which to *"pursue the issues presented"* and *"raise constitutional challenges"* and directly refutes Trial Judge Frank R. Zapata's underlying assumption, that the State court proceeding provides the Davidsons with an adequate state forum in which to pursue the issues presented.

The Davidsons exhausted all avenues for appellate review of their federal constitutional injury within the Arizona state court system. Neither the Arizona court of Appeals, nor the Arizona Supreme Court reached the federal constitutional issues raised by the Davidsons on appeal. With the filing of the Minute Entry of April 29, 2004, the Davidsons have now been permanently denied a legal remedy for federal constitutional injuries under color of Ariz. R. Civ. P. Rule 5.1 and the Prescription Drug User Fee Act, in both the Federal court proceedings and in the State court proceeding. The Davidsons now have no forum whatsoever, either state or federal, in which to raise their federal constitutional concerns. By inappropriately dismissing the Davidsons' federal court proceedings under the *Younger* abstention doctrine, the Trial Judge (Frank R. Zapata) has wrought irreparable harm to the Davidsons.

ARGUMENT IN SUPPORT OF WRIT

There is no timely remedy available to the Petitioners [the Davidsons], either state or federal, for the federal constitutional deprivation sustained in the ongoing state court proceeding under color of Arizona Rule 5.1 and the Prescription Drug User Fee Act. The danger of irreparable injury to the Davidsons is both great and immediate. *Younger v. Harris*, 401 U.S. 37 (1971). The threat to the Petitioners' federal rights is such that it cannot be eliminated before injunctive relief is available against the pending state court proceeding. Extraordinary circumstances render the state court incapable of fairly and fully adjudicating the federal issues before it. *Kugler v. Helfant,* 421 U.S. 117 (1975).

The federal question as to whether the Prescription Drug User Fee Act ("PDFUA") is constitutionally invalid *as applied* is of imperative public importance. The PDUFA has ongoing, direct, and substantial affect upon public health, safety, and interstate commerce. This case and controversy warrants deviation from normal appellate practice and requires immediate determination by this Court.

Arizona is seeking to enforce a facially unconstitutional statute (Arizona Rule 5.1). The *Younger* doctrine is inapplicable if the state tribunal to which the federal claims would be presented is found by the federal court to be incompetent by reason of bias to adjudicate the issue pending before it. *Gibson v. Berryhill*, 411 U.S. 564 (1973). The Younger doctrine allows intervention where the challenged statute is *flagrantly and patently* violative of express constitutional prohibitions. *Huffman v. Pursue*, Ltd., 420 U.S. 592 (1975).

An injunction to preserve the status quo during the pendency of the Davidsons' appeal can be issued when an appeal is taken from final judgment denying an injunction under FRCP Rule 62 (c). The state court proceeding should be emergently stayed pending appeal under FRCP Rule 62 (c). The Davidsons' federal cause of action sounds, *in substantial measure*, on federal constitutional deprivations under 42 USC Section 1983, the *"expressly authorized"* exception to the anti-injunction act.

The final judgments of the U.S. District Court dismissing the Davidsons' federal causes of action [in both federal court proceedings CV-03-00110-FRZ and CV-03-00580-FRZ] under *Younger* doctrine were *clearly erroneous*. The District Court's abstention judgments should be emergently stayed pending appeal, because there is a strong likelihood that the Davidsons will prevail on appeal, because there is a strong showing that abstention will cause irreparable injury to the Davidsons, and because abstention would result in harm to the public interest.

Injunctive relief should be granted because it is likely that certiorari will be granted and the judgments reversed. Extraordinary circumstances provide compelling necessity for a stay (or other equitable relief). *Whalen v. Roe*, 423 U.S. 1313 (1975). A balancing of the equities favors the grant of a stay (or other equitable relief) pending certiorari.

I. *Ariz. R. Civ. P., Rule 5.1 is flagrantly and patently* violative of express constitutional provisions

The Davidsons were denied federal constitutional rights by State Action under color of Ariz. R. Civ. P., Rule 5.1 (A)(2)(B) and (C) in the State court proceeding. Because of a series of recent 9th Circuit appellate cases, which base their holdings upon *U.S. v. Sardone*, 94 F.3d 1233 (1996) citing *Hedges v. Resolution Trust Corp.*, 32 F.3d 1360 (1994), the Davidsons fear that they will *ultimately* be forced to take their now fully-briefed 9th Circuit Court of Appeals Cases [03-17342 and 04-15304] to the U.S. Supreme Court. Such an *interminable delay* would have devastating economic effect upon the Davidsons.

There is currently a long-standing *split of authority* between the U.S. Circuit Courts of Appeals on the question of *the right to legal counsel in a civil lawsuit.* This split of authority amongst the U.S. Circuit Courts of Appeals urges this Court to review two final judgments of the U.S. District Court, District of Arizona, in the closely related federal cases CV-03-00110-FRZ and CV-03-00580-FRZ. These judgments involve identical or closely related questions, which draw in question the validity of Ariz. R. Civ. P., Rule 5.1 (A)(2)(B) and (C), on the ground of its being repugnant to the U.S. Constitution. The risk

of an erroneous deprivation by the State action in the State court proceeding is substantial. In *Mackey v. Montrym*, 443 U.S. 1 (1979), the U.S. Supreme Court stated that the only issue in cases of this type is *"what process is due to protect against an erroneous deprivation of that [property] interest."*

The 9th Circuit appears to currently abide by their holdings in *U.S. v. Sardone*, 94 F.3d 1233 (1996) *("It is well-established that there is generally no Constitutional right to counsel in civil cases.") citing Hedges v. Resolution Trust Corp.*, 32 F.3d 1360 (1994), cert. denied, 514 U.S. 1082 (1995). See also *Davis v. Central Bank, 23 B.R. 773 (1982) ("There is no Constitutional right to counsel in a legal proceeding unless it is criminal or quasi-criminal in nature.") and Hernandez v. Whiting,* 881 F.2d 768 (1989) *("A civil litigant, including an incarcerated prisoner, is presumed to have no Constitutional entitlement to court-ordered counsel unless his case carries the risk of affecting his physical liberty.").*

There is some earlier case law, however, within the 9th Circuit which supports the right to retained counsel. See *Montgomery Elevator Co. v. Superior Court of the State of Arizona, 135 Ariz. 432 (1983) ("The right to representation is basic to system of justice and extends to every facet of judicial process."). See also Arizona State Department of Public Welfare v. Barlow,* 80 Ariz. 249 (1956) *("Representation of party by his duly constituted attorney is fundamental to administration of justice.").*

The 5th Circuit case law, however, found in *Potashnick v. Port City Construction Company,* 609 F.2d 1101 (1980) *("A civil litigant has a Constitutional right to retain hired counsel.")* runs counter to the majority of the 9th Circuit holdings. So too do the 5th Circuit holdings found in *Texas Catastrophic Property Insurance v. Morales*, 975 F.2d 1178 (1992) *("There is a Constitutionally-guaranteed right to retain hired counsel in civil matters under the due process clause of Fourteenth Amendment.")* and in *McCuin v. Texas Power & Light Co.*, 714 F.2d 1255 (1983) (*"Subject to certain limitations, right to counsel expressly guaranteed by the Sixth Amendment in criminal cases, is no less fundamental in civil cases and springs from both statutory authority*

and from the constitutional right to due process of law.").

The Trial Judge in the federal court proceeding [CV-03-00580-FRZ] erred when he cites *U.S. v. Sardone*, 94 F.3d 1233 (1996) as authority for his view that *"there is generally no constitutional right to counsel in civil cases."* The Trial Judge fails to distinguish between the right to appointed counsel and the right to retained counsel in his sweeping statement, "*there is generally no constitutional right to counsel in civil cases*." The federal constitutional right to retained legal counsel in an ongoing civil proceeding was not a prospective property interest. It was a presently-enjoyed property interest once the Davidsons entered into a retainer agreement with Michael J. Meehan (Respondent).

The Davidsons were deprived of the presently-enjoyed benefit of retained counsel in an ongoing civil proceeding without procedural due process. The process that was due is, at minimum, a hearing. There was no such hearing afforded the Davidsons. The opposing legal counsel (Michael J. Meehan, Quarles Brady Streich & Lang LLP, and Bruce R. Heurlin) simply agreed between themselves and with the Court under color of Ariz. R. Civ. P., rule 5.1, and there was State Action. To say that there is generally no constitutional right to retained counsel in civil cases is a statement of such broad scope and sweep that it would undermine many, if not all, of the basic foundations upon which our legal system rests. The right to retained legal counsel is a basic personal right which requires that courts exercise special solicitude under the heightened (strict) scrutiny standard of review.

The Davidsons' complaint against Michael J. Meehan ("MJM") and Quarles Brady Streich Lang ("Q&BSL") is based on *whether the State has power to disenfranchise litigants from presently-enjoyed benefit of retained legal representation in an ongoing civil proceeding, without due process and equal protection guaranteed under the Fourteenth Amendment.* The Davidsons' property interest in their retained legal representation was a presently-enjoyed property interest at the time of the Trial Judge's Order granting attorney withdrawal. The Davidsons have a legitimate claim to entitlement to their retained legal representation in a civil proceeding. There was nothing permissive about

the Trial Judge's Order. The Order was arbitrary and capricious. There was no hearing or certification process afforded to the Davidsons.

The Davidsons did not voluntarily elect to proceed pro se. There were forced by State Action to proceed pro se. The Davidsons did not voluntarily elect to be stripped of their retained counsel of record. Granting an attorney the right to withdraw without the clients' consent interferes with civil litigants' Constitutional rights. The right to enjoy property without unlawful deprivation is a personal right. There is no real dichotomy between personal liberties and property rights. The right to the presently-enjoyed benefit of retained legal representation in an ongoing civil proceeding is a basic civil right. Arizona Rule 5.1 places a meaningful burden on a fundamental personal right. The Davidsons' challenge to the federal Constitutionality of Arizona Rule 5.1 rests on procedural and substantive due process grounds, equal protection grounds, takings clause grounds, and right to contract grounds. The strict (heightened) scrutiny standard of review should apply.

The issue before this Court is not whether the Davidsons had the *opportunity* to retain new legal counsel after the Trial Judge's Order of January 11, 2002, in the state court proceeding. The issue before this Court is whether: (a) Q&BSL's and MJM's *Motion to Withdraw **(after the action had been set for trial)***, (b) Grossmans' Nonobjection to Attorney Withdrawal, and (c) the Trial Judge's Order for Attorney Withdrawal (under Arizona Rule 5.1), provided the Davidsons with the guarantees of due process, equal protection, right to contract, and freedom from arbitrary Takings, found in the U.S. Constitution.

"There is now a relatively prevalent practice in the Arizona trial court system, under color of Rule 5.1, Ariz. R. Civ. P., to which the Superior Courts generally do not object, of submitting stipulations for the substitution of counsel without the client's written endorsement." See page 85 of the Arizona Civil Rules Handbook, 2002 Edition, by Daniel J. McAuliffe. Where state courts have regularly applied an unambiguous statute, there is no need for a federal court to abstain from determining the constitutionality of the statute until state appellate courts have had an opportunity to construe it. *City of Houston, Tex. v. Hill*, 482

U.S. 451 (1987).

Ariz. R. Civ. P., Rule 5.1 (A)(2)(B) and (C), is facially unconstitutional. It subrogates client's rights to those of their attorney's, based upon a conclusive presumption of the trial judge. It creates a constitutionally-impermissible unequal classification of clients and attorneys. It provides none of the citizens of the State of Arizona with constitutionally-guaranteed protections of presently-enjoyed property and liberty interests in their retained legal counsel.

Every Arizona citizen is vulnerable to the same federal constitutional deprivation, because clause (ii) of Ariz. R. Civ. P. Rule 5.1 (A)(2)(C) is written as a *disjunctive condition*, that is it reads, [in pertinent part], "*..., or (ii) unless the court is satisfied for good cause shown that the attorney should be permitted to withdraw.*" This statutory construction renders Ariz. R. Civ. P. Rule 5.1 to be *"flagrantly and patently"* violative of express Constitutional protections. There is no hearing or certification process afforded to clients to protect client's rights. There is no protection against the risk of error by the state. The consequence of error is substantial.

It is doubtful that even *"a remarkable job of plastic surgery upon the face of the [statute]"* could save it, for it nowhere makes a hearing or certification process mandatory to protect client's rights from wrongful deprivation. Arizona Rule 5.1 is not reasonably susceptible of a limiting construction that would avoid the constitutional question posed in this case, because its language is plain and its meaning unambiguous. *City of Houston, Tex. V. Hill*, 482 U.S. 451 (1987).

The enactment and statewide enforcement of Ariz. R. Civ. P. Rule 5.1 represents purposeful and invidious discrimination by the Arizona court system in favor of attorney's rights over client's rights. The Arizona court system is not capable of rendering an unbiased evaluation of the federal constitutionality of Ariz. R. Civ. P. Rule 5.1. The fact that the Arizona Court of Appeals dismissed the Davidsons' appeal without reaching the merits of the appeal, and the Arizona Supreme Court denied the Davidsons' Petition for Review [unpublished ruling], is entirely consistent with the Davidsons' assertion that the Arizona Court system

is institutionally biased. *The Arizona Court system is either unwilling or unable to hold itself [Arizona Rule 5.1] to be unconstitutional.* The Arizona court system is not a competent state forum in which to raise the Davidsons' constitutional challenges.

There is a causal link between the Davidsons' injury and the State's action sufficient to support standing under Article III. Amongst the violations alleged in the Davidsons' Complaint against MJM and Q&BSL is an unconstitutional deprivation of property [and liberty, equal protection, right to contract, and right to freedom from Takings]. The State has exercised *"coercive power"* or provided such significant encouragement that *"the choice must in law be deemed to be that of the State"*. The Davidsons had a protectable, presently-enjoyed, property interest in their retained legal representation in the State court proceeding. The State actors deprived them of this property interest without procedural fairness. The State did not provide the Davidsons with either a pre-deprivation or a post-deprivation hearing. The State did not provide the Davidsons with an opportunity to sign a certification stating that they had made suitable arrangements to be prepared for trial.

The Davidsons assert that their having an attorney under retainer for more than 2 years *[until 4 months before the scheduled trial date]*, heightens their interest in receiving procedural safeguards to ensure that constitutionally-protected, presently-enjoyed, rights of liberty and property are not arbitrarily terminated by State action.

The Davidsons were impermissibly deprived of liberty and property without procedural fairness. They were entitled to the expectancy that their presently enjoyed liberty and property rights would not be arbitrarily terminated by the Trial Court in the State court proceeding. The Davidsons were arbitrarily and impermissibly denied an opportunity to challenge the Trial Court's Order of January 11, 2002, in violation of the procedural due process (fundamental fairness) guarantee under the Fourteenth Amendment. The Trial Court in the State court proceeding summarily absolved MJM and Q&BSL of their contractual and professional responsibility to their clients [the Davidsons] at the precise

moment of their clients' greatest need, i.e., just before trial, under Rule 5.1 (A)(2)(B) and (C), Ariz. R. Civ. P.

The Davidsons assert that there is a Constitutionally- protected property interest in retained legal counsel in civil lawsuits. The Davidsons were irrevocably deprived of this property interest by State action. There was no hearing or certification [by means of Davidsons' signature] process, either before or after the Trial Judge's Order. The State wishes for the attorney withdrawal process to be as economical and expeditious as possible, to avoid the necessity of a hearing or certification process. This poses a significant conflict of interest for the State.

In *Mathews v. Eldridge*, 96 S.Ct. 893 (1976), the Supreme Court recognized that what process is due varies in relation to the interests at stake and the nature of the governmental proceedings. The Court held that notice and a trial-type hearing must be afforded before the State on its own initiative may severe the bonds of parenthood. In the cases at bar [CV-03-00110-FRZ and CV-03-00580-FRZ], however, the State's aim is not simply to influence the attorney-client relationship, but to extinguish it. A termination of client's rights is both total and irrevocable. This forced dissolution of the attorney-client relationship should be recognized as a punitive sanction by courts. Termination of client rights by the State is a *"unique kind of deprivation"*. The State's [Trial Judge's Order of January 11, 2002] action under color of Rule 5.1, *"completely and permanently terminated all rights and obligations"* between attorney and client.

Procedural norms are devised to ensure that justice may be done in every case, and to protect litigants against unpredictable and unchecked adverse governmental action. The State's interest [pecuniary] is in avoiding the cost and administrative inconvenience that might accompany a right to retained counsel in a civil lawsuit. This Court should hold that Rule 5.1, Ariz. R. Civ. P. is *flagrantly and patently* unconstitutional. Under the 3 prongs of the Eldridge case, the private interest in their property interest in retained counsel is weighty, the procedure devised by the State [procedure by means of a hearing or

certification by client is non-existent under Rule 5.1] is fraught with risks of error, and the countervailing governmental interest [solely pecuniary] is insubstantial.

Classifications which impinge upon (jeopardize) the exercise of a fundamental right are treated as presumptively invidious and subject to heightened (strict) scrutiny.

Procedural due process alone will not prevent the state from wrongfully depriving the Davidsons of their retained legal counsel. The Davidsons exclusion from their retained legal representation pursuant to Arizona Rule 5.1 *is patently arbitrary or discriminatory.* Government may not classify individuals as eligible or ineligible where the basis of classification is "arbitrary or discriminatory".

The Trial Court in the State court proceeding conclusively presumed that certain facts existed which permitted it to categorize the Davidsons into a class (clients), and thereby subject them to burdens not visited upon others (attorneys), in violation of the due process and equal protection guarantee under the 14th Amendment. The Trial Court's ruling (Order of January 11, 2002) effectively subrogated the Davidsons' rights to those of their attorney's (Q&BSL's) by *"classifying"* Q&BSL's statements as truthful without proof, i.e. a conclusive presumption, and without providing the Davidsons an opportunity to challenge the truthfulness of Q&BSL's statements. The State Court system of Arizona created a constitutionally-impermissible unequal *"classification"* of clients vis a vis their attorneys, when Rule 5.1 (A)(2)(B) and (C), Ariz. R. Civ. P., was enacted, which is at variance with the equal protection clause of the 14th Amendment.

The Davidsons have not only established that Arizona Rule 5.1 and the state action complained of had a disproportionate or discriminatory impact, but also that the action was taken with intent to discriminate, *so as to permanently deny their clients a legal remedy for the crimes alleged in the federal court proceedings and avoid their contractual and professional responsibility to their clients, just 4 months before the scheduled trial date*. See the Prosecution Memorandum of November 20, 2000.

II. The Prescription Drug User Fee Act, as applied, is repugnant to the U.S. Constitution

There is a class of victims who have been *intentionally (and/or recklessly) endangered* under color of the Prescription Drug User Fee Act (abbreviated herein as the "PDUFA") and deprived of 5th Amendment Due Process and Equal Protection. The PDUFA was originally enacted by Congress in 1992. It has since been reenacted several times (as the PDUFA I, II, and III) and is presently found in 21 U.S.C. Sections 379g-379h. But for this intentional (and/or reckless) endangerment, some members of this class have been *hospitalized* and some have *died.* This class of victims *(endangered and dead)* presently has no statutorily-defined advocate. Another class of victims have been intentionally denied their intangible right to honest services and their right to 5th Amendment due process and equal protection, under color of the PDUFA. The Davidsons are members of this class. Robert Davidson, M.D. was a specifically targeted victim, because as *clinical research subinvestigator*, he was someone who might otherwise "blow the whistle" on the illegal enterprise.

The State court proceeding should be emergently enjoined because the wrongs permitted under color of the PDUFA are preempted and subsumed by federal law. The wrongs permitted under color of the PDUFA are *capable of repetition* yet evade review. The PDUFA, as applied, is repugnant to the U.S. Constitution and should be declared by this Court to be constitutionally invalid.

The Davidsons' Article III standing, upon which they depend to bring their federal cause of action in the Federal court proceeding at bar, depends in part on injuries proximately caused by the defendants' Federal Action under color of the PDUFA. Selective enforcement of the PDUFA by officials of the FDA acting in their personal capacities for personal financial gain has deprived the Davidsons of their intangible right to honest services and 5th amendment right to due process and equal protection. Selective enforcement, if based upon improper motives, can violate equal protection. *Gale v. North Dakota Bd. of Podiatric Medicine*, 1997 ND 83 (1997). A statute may be held

constitutionally invalid as applied, when it operates to deprive an individual of a protected right. *Little v. Streater*, 452 U.S. 1 (1981). The Davidsons have provided evidence in the federal court proceeding of a discriminatory design to favor one individual or class over another. *Snowden v. Hughes*, 321 U.S. 1 (1944).

The Davidsons have made a showing of clear and intentional discrimination in the federal court proceeding. Strict scrutiny of a classification under the PDUFA affecting a protected class is properly invoked only where the plaintiff can show intentional discrimination by the government. *Wisconsin v. City of New York*, 517 U.S. 1 (1996). Clinical research subjects, inappropriately screened specialty practice patients, clinical research coordinators, and *clinical research subinvestigators*, are groups which are particularly vulnerable to discriminatory treatment by officers of the FDA (acting in their personal capacity for personal financial gain) under the PDUFA. The PDUFA provides corporate pharmaceutical research sponsors with a robust statutorily-sanctioned vehicle for bribery of FDA officials.

The application of the PDUFA to the Tucson, AZ FDA EIR of 5/5-6/28/99 by the FDA was improperly motivated. See Sanjour v. E.P.A., 56 F.3d 85 (1995). The application of the PDUFA to the Albany, NY FDA EIR of 10/22-12/23/97 by the FDA was improperly motivated. Officials of the FDA (acting in their personal capacities) were bribed [into selectively applying the PDUFA] by Big Pharma representatives (acting in their representative capacity), so as to facilitate "*expedited*" review and market approval of their New Drug Applications (NDAs), while the *for-cause "investigations"* of the clinical research misconduct languished indefinitely.

The FDA and Big Pharma are intertwined in a symbiotic relationship as co-beneficiaries of the constitutionally impermissible classification provided them under the PDUFA. Victims of this classification include intentionally (and/or recklessly) endangered clinical research subjects, specialty practice patients, clinical research coordinators, and *clinical research subinvestigators* (such as Robert Davidson, M.D.). FDA representatives (acting in their personal capacity)

and Big Pharma are *joint participants* in an ongoing "expedited" drug approval enterprise under the PDUFA. *As applied* the PDUFA is unconstitutional because its classification impinges upon the right to due process and equal protection of the 5th Amendment.

Corporate pharmaceutical company ("Big Pharma") representatives are reasonably thought (by information and belief) to have testified on Jay Grossman's behalf (in the early 1990's) in an Albany, NY lawsuit between Jay Grossman and three physicians (Richard Ball, M.D., David Shulan, M.D., and Scott Osur, M.D.), wherein allegations of research fraud and violence were made against Jay Grossman. Albany Medical College and representatives of the FDA (acting in their personal capacities) are reasonably thought (by information and belief) to have facilitated Jay Grossman's relocation from Albany, NY to Tucson, AZ *during on ongoing FDA investigation* of Grossman's clinical research conduct (in Albany, NY) in support of New Drug Applications for several Big Pharma corporation research sponsors in the early 1990's. A "waiver" or *"special dispensation"* from the usual FDA inspection protocols is known to have been granted to Jay Grossman by FDA officials (acting in their personal capacities) during the *"relocation"* of Jay Grossman's clinical research practice from Albany, NY to Tucson, AZ, in the early 1990's.

Paragraph 2, page 1 of the FDA Tucson, AZ EIR of 5/5-6/28/99 states *"This inspection report was delayed due to a PDUFA report."* The Principal Investigator [Jay Grossman, M.D.] was *terminated for cause* on July 30, 1999, by Vivra Inc, yet paragraph 1, page 1, of the FDA Tucson, AZ EIR of 7/6-7/10/00, states, *"Review of records found no deviations..."*

For the FDA to ever find evidence of serious misconduct by Jay Grossman, M.D. or Thomas Edwards, M.D., is to risk the FDA eventually needing to revoke the FDA approvals which were "*granted*" during the pendency of their *"investigations"*. It is for this reason that there have, to date, not been any formal sanctions by the FDA against Jay Grossman. To initiate formal sanctions against Jay Grossman would necessitate the recall, and revocation of the NDA

approvals, of all of the drugs which have gained market approvals based upon fraudulent and seriously flawed clinical research by Jay Grossman. Jay Grossman, M.D. and Thomas Edwards, M.D. were well-known in the industry as *"high-enrollers"*. Both Big Pharma and the FDA regularly give special dispensations and waivers to *"high-enrollers"*. Special dispensations and waivers were routinely granted to Jay Grossman by Big Pharma and the FDA.

It is not by accident that the FDA routinely dissociates inspections of clinical research facilities (the clinical investigators) from that of the study drugs themselves (the data upon which market approvals are granted). In this way, principal investigators can be terminated for cause (as was the case with Jay Grossman, M.D.) or placed on an FDA Restricted List (as was the case with Thomas Edwards, M.D.), while the index New Drug Applications still proceed to obtain expedited market approvals from the FDA (as was the case for one or more of the index study drugs in the FDA's "*for cause*" audit of the Vivra Tucson facility on 5/5-6/28/99 and the FDA audit of the Albany facility on 10/22-12/23/97). Thus, the linkage between the misconduct of clinical investigators (Jay Grossman and Thomas Edwards), the fraudulent clinical research study results, and the market approvals by the FDA for the study drugs of the corporate sponsors (Big Pharma), was concealed from the unknowing public and victims of the frauds (intentional endangerments and denials of due process and equal protection).

There has been much debate about whether, as a result of the PDUFA, "*priority review*" of NDAs by the FDA has led to bad decisions. A privilege, benefit, opportunity, or public advantage may not be granted to some but withheld from others where the basis of classification and difference in treatment is arbitrary or discriminatory. As applied, the difference in treatment, under the PDUFA, is *intentionally discriminatory*. This Court should declare the PDUFA to be constitutionally invalid *as applied*, under the strict scrutiny standard of review.

"A refusal to enforce that stems from a conflict of interest, that is the

result of a bribe, vindictiveness, retaliation, or that traces to personal or other corrupt motives ought to be judicially remediable." Heckler v. Chaney, 470 U.S. 821 (1985). "Traditional principles of rationality and fair process do offer 'meaningful standards' and 'law to apply' to an agencies' decision not to act, and no presumption of unreviewability should be allowed to trump these principles." Marshall v. Jerrico Inc, 446 U.S. 238 (1980).

The Davidsons have not only established that the PDUFA and the federal action complained of had a disproportionate or discriminatory impact upon its victims, but also that the action was taken with intent to discriminate for both personal and corporate financial gain. Corporate pharmaceutical research sponsors have serially gained "expedited review" and marketing approvals from the FDA by means of this discriminatory scheme (the PDUFA). Clinical research investigators and FDA officials acting in their personal capacities have been the recipients of serial bribes from corporate pharmaceutical research sponsors.

This Court should look to the effect (serial intentional and/or reckless endangerments, deaths, Hobbs Act violations, and 5th Amendment due process and equal protection deprivations) and not to the form of the classification. Social and economic legislation that impinges on fundamental rights (to life, liberty, and constitutional rights) cannot be upheld against equal protection attack, even when the legislative means are rationally related to a legitimate governmental purpose.

A clear pattern emerges (serial, related, "*expedited*" marketing approvals while "*for cause*" audits are intentionally stone-walled) from the effect of federal action under the PDUFA, even when the governing legislation appears neutral on its face. The PDUFA should be declared by this Court to be constitutionally invalid *as applied*, under 5th Amendment due process *and equal protection.* The doctrine of mootness is inapplicable to the PDUFA, because the wrongs made possible under the PDUFA are *capable of repetition, yet evade review*, under past, present, and future Congressional enactments of the PDUFA. The ends

(expedited drug approvals) do not justify the means (intentional and/or reckless endangerments, deaths, Hobbs Act violations, and 5th Amendment due process and equal protection deprivations).

III. The State Court proceeding should be enjoined on federal preemption grounds

The direct, substantial, and ongoing effect upon interstate commerce by the conspiracy of the defendants in CV-03-00110-FRZ warrants federal preemption under the dormant Commerce Clause of the U.S. Constitution [Article I, Section 8]. A preemption claim that is "*facially conclusive*" should constitute an exception to *Younger* abstention. *New Orleans Pub. Serv. Inc v. Council of City of New Orleans*, 491 U.S. 350 (1989). *U.S. v. Lopez,* 115 S.Ct. 1624 (1995).

The defendants in CV-03-00110-FRZ have effectively waived any supposed "right" to a state court forum, by virtue of their having injected themselves, their business, and their conduct, into the stream of interstate commerce. See Opening Brief [9th Circuit docket #03-17342], page 25, lines 21-24. The Grossmans' filing of the State court proceeding in state court, in July of 1999, was a conscious attempt to avoid the very real possibility of a federal court ever reaching the issues surrounding their conduct in interstate commerce over the last decade, in both Albany, NY and Tucson, AZ.

Where the interests at stake are "uniquely federal" in nature, preemption of state law by federal common law is allowed. *Boyle v. United Technologies Corp.*, 487 U.S. 500 (1988). No less than the integrity of the manner in which prescription drugs are approved for marketing in this country is at issue in CV-03-00110-FRZ. See Opening Brief [9th Circuit docket #03-17342], page 21, lines 12-18. Clinical research studies with human subjects are typically conducted in an area of complete federal preemption. See page 17, lines 1-2, Reply Brief [9th Circuit docket # 03-17342]. In the case at bar, the defendants' dealings with the FDA are prompted by the FDCA (Food, Drug, and Cosmetic Act) and the PDUFA (Prescription Drug User Fee Act), presently in its 3rd enactment by Congress. The Davidsons have alleged deprivation of their right to due process and equal protection under the Fifth

Amendment of the U.S. Constitution by Federal Action under color of the Prescription Drug User Fee Act. See Reply Brief [9th Circuit docket #03-17342], page 17, lines 15-22.

FDA officials acting in their personal capacities and the Prescription Drug User Fee Act, enactments I, II, and III (PDUFA I, II, and III) are essential elements in this drug approval enterprise. Serial corporate bribery by Big Pharma of the FDA (acting in their personal capacities) under color of official right provided by the PDUFA I, II, and III, can be likened to the gasoline which fuels the engine of this thoroughly corrupt [drug approval] enterprise. See Opening Brief [9th Circuit docket #03-17342], Page 24, lines 7-12.

Serial related Hobbs Act (18 USC Section 1951) and Travel Act (18 USC Section 1952) violations have been pleaded in the Federal court proceeding. The fruit of the defendants' misconduct in the Federal court proceeding has resulted in approvals by the FDA of numerous New Drug Applications for their corporate pharmaceutical sponsors, and personal and corporate financial gain for the enterprise.

Without the predicate act violations, in a pattern of racketeering activity, and overt acts of conspiracy found in the FDA Tucson, AZ EIR [Establishment Inspection Report] of 5/5-6/28/99, a substantially delayed and heavily redacted copy of which was finally obtained by [the Davidsons] on or about February 20, 2001, by means of an FOI request, [the Davidsons] did not know that a conspiracy existed. Page 13, Paragraph 11, of the FDA Tucson, AZ EIR of 5/5-6/28/99 documents an agreement to obstruct justice, overt acts of conspiracy to obstruct justice, and provides the *mens rea* for obstruction of justice, attempt to obstruct justice, and conspiracy to obstruct justice. See Davidsons' First Amended Complaint, page 12, paragraph 35.

The success of the defendants' ongoing conspiracy to conceal and perpetuate schemes to serially defraud the plaintiffs, specialty practice patients, clinical research subjects, and the United States, is reflected in the FDA EIR at the "Vivra" Tucson facility on 7/6-10/00, a redacted copy of which was obtained through FOI by the plaintiffs. Paragraph 1, Page 1 states: *"This was a High Priority CDER User Fee NDA Pre-*

Approval Study-Oriented Clinical Investigator Data Validation Inspection assigned by HFD-46 to audit...under CP 7348.811. Review of records found no deviations and no FD-483 was issued." The Principal Investigator [Jay Grossman, M.D.] was terminated for cause on July 30, 1999, by Vivra Inc, yet the FDA's report on 7/10/2000 states *"Review of records found no deviations..."* Thus, the FDA Tucson AZ EIRs of 5/5-6/28/99 and 7/6-10/00 made no findings which in any way deterred the Big Pharma corporate sponsors from proceeding under the PDUFA II [now proceeding under the PDUFA III] to gain expedited FDA "review" and market approval of their products.

Paragraph 2, Page 1 of the FDA Tucson, AZ EIR of 5/5-6/28/99 states *"This inspection report was delayed due to a PDUFA report."* The PDUFA [Prescription Drug User Fee Act] status of at least one of the index clinical research studies inspected by the FDA at the Vivra Tucson, AZ, 698 E. Wetmore Road facility in 1999 was a very substantial cause of injury to the Davidsons. *By delaying the publication of the FDA Tucson, AZ EIR of 5/5-6/28/99, the PDUFA II substantially delayed the time at which the [Davidsons] could begin to seek a legal remedy against the defendants.* This "delay" was intentional. "Expedited" market approvals of New Drug Applications by the FDA took place during this "delay" and during the pendency of the ostensibly ongoing criminal investigation of [Jay Grossman's] conduct by the Criminal Division of the FDA. Time in the marketplace is literally worth billions to Big Pharma. See pages 3-5 and pages 12-16 of the Davidsons' First Amended Complaint (U.S. District Court Case # CV-03-00110-FRZ).

An object of the ongoing conspiracy to defraud was [is] to gain "expedited" market approvals [under color of the PDUFA], at the expense of 5th Amendment Due Process and Equal Protection rights [of the Davidsons *and others*], for personal or corporate financial gain. There is a recurring pattern of expedited market "approvals" of New Drug Applications by the FDA, while both routine and "for cause" investigations of clinical research establishments are selectively "delayed" [intentionally "stone-walled"] under the auspices of the PDUFA I and II (and now under the PDUFA III). This ongoing

conspiracy to defraud [the Davidsons], willfully and knowingly endangers both clinical research subjects and the U.S. public who are exposed to marketed drugs which may be unsafe. Deaths have occurred by reason of this ongoing conspiracy to defraud. There is a very real threat that more deaths and intentional (and/or reckless) endangerments will occur by reason of this conspiracy under color of the PDUFA III [and subsequent enactments of the PDUFA]. See the Davidsons' First Amended Complaint, pages 15-16, paragraphs 43-45.

IV. The U.S. District Court erred when it dismissed CV-03-00110-FRZ and CV-03-00580-FRZ under the abstention doctrine of Younger v. Harris

None of the requirements were met for *Younger* abstention in U.S. District Court Cases CV-03-00110-FRZ and CV-03-00580-FRZ. A proceeding is "pending" within the meaning of the Younger doctrine until state appellate remedies are exhausted. *Huffman v. Pursue, Ltd.*, 420 US 592 (1975).

The Davidsons were compelled to file their Original Complaint in CV-03-00110-FRZ on February 19, 2003, *so as to avoid lapsing of the relevant statute of limitations* for bringing federal RICO actions under 18 USC Section 1964 (a) and (c), against Vivra Inc, et al.

Similarly, the Davidsons were compelled to file their Original Complaint & Application for Injunctive Relief in CV-03-00580-FRZ on November 20, 2003, *so as to avoid lapsing of the relevant statute of limitations* for bringing legal malpractice actions against MJM and Q&BSL.

The Davidsons exhausted all available state appellate remedies *prior to filing* their Original Complaint & Application for Injunction Relief in CV-03-00580-FRZ on November 20, 2003, and *prior to filing* their Motion for Preliminary Injunctive Relief in CV-03-00110-FRZ on October 21, 2003. The Arizona Supreme Court denied the Davidsons' Petition for Review on August 8, 2003. Thus, *there was no pending state judicial proceeding at the time federal proceedings were initiated.* There has never been an ongoing state proceeding against MJM and Q&BSL. The first Middlesex prong is lacking in both federal court

proceedings [CV-03-00110-FRZ and CV-03-00580-FRZ].

There are no important state interests implicated in the State court proceeding. *Younger* abstention is proper only when the state asserts a vital interest which is directly in issue in the underlying state proceeding. A vital state interest is "implicated" in the state court proceeding when the state interest is the subject matter of that proceeding. *Traughber v. Beauchane*, 760 F.2d 673 (1985). A state cannot have a substantial state interest in enforcing an invalid law. *Champion International Corp. v. Brown*, 731 F.2d 1406 (1984). Private tort litigation does not implicate state interests. *Miofsky v. Superior Court of the State of California*, 703 F.2d 332 (1983). The Davidsons' concerns regarding the federal constitutionality of Arizona Rule 5.1 and the Prescription Drug User Fee Act are not substantial enough interference with Arizona's administrative and judicial processes to justify abstention. The second Middlesex prong is lacking in both federal court proceedings [CV-03-00110-FRZ and CV-03-00580-FRZ].

Arizona's interest in forcing clients to yield their retained legal counsel, after the action has been set for trial, in response to court's civil order, was not an important interest for purpose of *Younger* abstention doctrine that required District Court to abstain from interfering with enforcement of an Arizona order/judgment. *There is no important state interest in enforcing unconstitutional statute.*

The Davidsons federal court proceedings are distinguished from the fact pattern found in *Pennzoil Co. v. Texaco*, 481 U.S. 1 (1987), because the Davidsons attempted to present their constitutional claims to the Arizona courts. The Arizona constitution does not have an open-courts provision similar to that of the Texas constitution. Where litigant has attempted to present federal claims in related state court proceedings, federal court should not assume that state procedures afford adequate remedy, *in absence of unambiguous authority to the contrary.*

The Davidsons were barred from raising federal claims in the State court proceeding. See *Lebbos v. Judges of Superior Court*, 883 F.2d 810 (1989). The Davidsons affirm that in the State court proceeding, Arizona Court of Appeals [2CA-CV-2002-0051], and Arizona Supreme

Court [CV-03-0138-PR], they did not have an opportunity to raise their federal claim in state court because they were procedurally barred from raising such claims. *Dubinka v. Judges of Superior Court*, 23 F.3d 218 (1994). *Younger* abstention is not appropriate when state law imposes procedural barriers to raising the constitutional claims in state court proceedings. *Moore v. Sims*, 442 U.S. 415 (1979). *Reno v. American-Arab Anti-Discrimination Committee*, 525 U.S. 471 (1999). The third Middlesex prong is lacking in both federal court proceedings [CV-03-00110-FRZ and CV-03-00580-FRZ].

None of the *other* abstention doctrines are even potentially-applicable to the Davidsons' federal court proceedings because *there have never been parallel duplicative state proceedings*. A suit is *"parallel"* when substantially the same parties are contemporaneously litigating substantially the same issues in another forum. It is imminently clear from the state court Minute Entry of April 29, 2004, that the present likelihood that the state litigation will dispose of all claims presented in the federal case is *completely nil*.

The federal district court trial judge's *initial dismissal* of CV-03-00110-FRZ under Rule 8, on July 1, 2003, *with leave to file a second amended complaint*, was the practical equivalent of a final judgment, because the Magellan defendants' Notice of Automatic Stay was replaced by a permanent injunction, once their bankruptcy discharge was confirmed. The Magellan defendants' fraud upon the U.S. Bankruptcy Court, by officers of the court (the Magellan defendants' legal counsel), was targeted at obtaining their Discharge confirmation. There was never any intent by the Magellan defendants to file a Notice Lifting the Stay. The U.S. Bankruptcy Court has *ignored* two prior motions by the Davidsons to lift the automatic stay in CV-03-00110-FRZ, thereby depriving them of 5th Amendment due process in the Magellan defendants' Chapter 11 proceeding.

The Notice of Automatic Stay and subsequent Permanent Injunction *[after their discharge confirmation was obtained by fraud upon the U.S. Bankruptcy Court, Southern District of New York]* by means of the Chapter 11 filing by the Magellan defendants, actually prevented

the Davidsons from filing a Second Amended Complaint in the U.S. District Court proceeding [CV-03-00110-FRZ]. The Davidsons were prevented from adding civil rights counts to their federal complaint under 42 USC Section 1983, Section 1985, and Section 1988. The Davidsons were actually prevented in the federal court proceeding from asserting the "*expressly authorized*" exception to the Anti-Injunction Act provided by 42 USC Section 1983.

By inappropriately dismissing the federal court proceedings under the abstention doctrine of *Younger v. Harris*, the federal Trial Judge has wrought irreparable harm to the Davidsons. This irreparable harm is a direct consequence of the federal court's *clearly erroneous* abdication under *Younger* of its responsibility for jurisdiction over the Davidsons' federal cause of action.

The Davidsons are now forced to represent themselves pro se in the State court proceeding, before a biased trial judge, with an irrevocably-prejudiced case, without the previously-enjoyed benefit of retained legal counsel, *based solely upon a conclusive presumption of the trial judge.*

The Minute Entry of April 29, 2004, is material to the question of bias of the trial judge and competency of the state court proceeding. The Memorandum Decision of the Arizona Court of Appeals on February 27, 2003, and the Arizona Supreme Court's denial of the Davidsons' Petition for Review on August 8, 2003, also go directly to the competency of the state court proceeding and institutional bias of the Arizona court system. The due process clause entitles a person to an impartial and disinterested tribunal in both civil and criminal cases.

When the trial judge dismissed the federal court proceedings [CV-03-00110-FRZ- and CV-03-00580-FRZ] under the abstention doctrine of *Younger v Harris*, he stated that Davidsons have an adequate opportunity to litigate any alleged federal claims in the ongoing state court proceeding. *This is clearly not true*, particularly in light of the State court Minute Entry of April 29, 2004. Comity goes too far if it gives inadequate attention to federal interests. *DeSpain v. Johnson*, 731 F.2d 1171 (1984). The State court Minute Entry of April 29, 2004, *is not signed by the trial judge*, and as such, is not an appealable final

judgment, *under Arizona law. Apache East, Inc. v. Means*, 124 Ariz. 11 (1979). This Minute Entry, makes it impossible for the Davidsons to *fairly* pursue their constitutional claims in the ongoing state proceeding. Since Arizona court rules did not permit raising the Rule 5.1 constitutional claim in the state court proceedings, *Younger* abstention principles were not applicable to the federal court action seeking to enjoin enforcement of an unconstitutional statute. The federal district court judge's dismissal of the federal court proceedings under the *Younger* doctrine is therefore clearly erroneous and should be reversed. The state court's enforcement of the facially unconstitutional Arizona Rule 5.1 is of such magnitude as to justify the federal court's intervention in state affairs and is sufficient to overcome general abstention principles. *J.P. v DeSanti,* 653 F.2d 1080 (1981). *The Davidsons now have no forum whatsoever, either state or federal in which to raise their federal constitutional concerns.*

The Prosecution Memorandum of November 20, 2000, provides this Court with strong support for the Davidsons' contention that they at no time "*slept on their rights*", or acted in any dilatory or improper motive in either the state or the federal court proceedings. Intrinsic frauds by Jay Grossman *and others*, are detailed in the Prosecution Memorandum. By information and belief, Q&BSL and MJM knew the substance and content of the "Prosecution Memorandum" before they filed their Motion to Withdraw as counsel of record in the State court proceeding. Yet, Q&BSL and MJM agreed [with each other] to continue to refuse to bring Arizona fraud, Arizona RICO, and federal RICO actions, on behalf of their then clients, the Davidsons, despite repeated requests by the Davidsons to bring such actions. The object of their refusal was to permanently deprive the Davidsons of a legal remedy for the injuries wrought upon them by the Grossmans *and others*. Q&BSL and MJM thus completely avoided their contractual and professional responsibility to their clients after having "drained" them of over two years of attorney's fees and costs, just four months before the scheduled trial date.

There was not "*good cause appearing therefore*", upon which to base the State court's Order of January 11, 2002, which Ordered that

attorney withdrawal is granted. By the totality of the circumstances, information and belief, MJM and Q&BSL, conspired with each other, as State Actors [including the Grossmans and the Trial Judge] to deprive the Davidsons of their constitutionally-protected, presently-enjoyed, property interest in retained legal counsel in an ongoing civil proceeding, under color of Ariz. R. Civ. P. Rule 5.1. Claims for violations of 42 USC Section 1983 are "*expressly authorized*" exceptions to the Anti-injunction Act.

Conclusion

Ariz. R. Civ. P., Rule 5.1 (A)(2)(B) and (C) should be declared facially unconstitutional. The Prescription Drug User Fee Act should be declared unconstitutional *as applied*. The federal court dismissals under the *Younger* doctrine are *clearly erroneous* and should be reversed. The federal court proceedings should be consolidated and remanded for trial. The State court proceeding should be ***emergently*** stayed under FRCP 62 (c) on federal constitutional and preemption grounds. The requirement of a supersedeas bond should be waived.

APPENDIX

APPENDIX A: Ariz. R. Civ. P., Rule 5.1 (A)(2) (B) and (C)....App. 1

APPENDIX B: Order, November 24, 2003, U.S. District Court, Arizona District, Docket No. 56, Civil Case # CV-0300110FRZ.....App. 2

APPENDIX C: Order, February 2, 2004, U.S. District Court, Arizona District, Docket No. 9, Civil Case # CV-03-00580-FRZ.....App. 6

APPENDIX D: Minute Entry, In Chambers Ruling, File Stamp Date: April 29, 2004, Pima County Superior Court, Case No. C333954 .....App. 11

APPENDIX E: Memorandum Decision, Appeal Dismissed, February 27, 2003, Arizona Court of Appeals, Division Two, Case No. 2 CA-CV 2002-0051.....App. 14

APPENDIX F: Order of Arizona Supreme Court re: action taken August 8, 2003; ORDERED: Petition for Review to Supreme Court = DENIED. FURTHER ORDERED: Request for Attorneys' Fees [Appellees Grossman] = GRANTED, Arizona Supreme Court Case No. CV-03-0148-PR.....App. 18

APPENDIX G: Copy of 9th Circuit ORDER: case is dismissed as to appellees Vivra Inc, Magellan Specialty Health Inc, and Allied Specialty Care Services LLC f/k/a Allied Specialty Care Services Inc ONLY. U.S. District Court, Arizona District, Case No. CV-03-00110-FRZ, Docket # 61 entered on April 16, 2004.....App. 19

APPENDIX A

Arizona Rules of Civil Procedure

Rule 5.1. Duties of Counsel

(A) Attorney of Record: Withdrawal and Substitution of Counsel.

(2) Withdrawal and Substitution. Except where provided otherwise in any local rules pertaining to domestic relations cases, no attorney shall be permitted to withdraw, or be substituted, as attorney of record in any pending action except by formal written order of the court, supported by written application setting forth the reasons therefore together with the name, residence and telephone number of the client, as follows:

(B) Where such application does not bear the written approval of the client, it shall be made by motion and shall be served upon the client and all other parties or their attorneys. The motion shall be accompanied by a certificate of the attorney making the motion that (i) the client has been notified in writing of the status of the case including the dates and times of any court hearings or trial settings, pending compliance with any existing court orders, and the possibility of sanctions, or (ii) the client cannot be located or for whatever other reason cannot be notified of the pendency of the motion and the status of the case.

(C) No attorney shall be permitted to withdraw as attorney of record after an action has been set for trial, (i) unless there shall be endorsed upon the application therefore either the signature of a substituting attorney stating that such attorney is advised of the trial date and will be prepared for trial, or the signature of the client stating that the client is advised of the trial date and has made suitable arrangements to be prepared for trial, or (ii) unless the court is satisfied for good cause shown that the attorney should be permitted to withdraw.

APPENDIX B

___FILED ___LODGED
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NOV 24 2003
CLERK US DISTRICT COURT
DISTRICT OF ARAZONA

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

Robert M. Davidson, Vanessa E. Komar, Plaintiffs	)	No. CV03-110 TUC FRZ
vs	)	ORDER
Vivra Inc, et al., Defendant	)	

Before the Court for consideration is "Plaintiffs' Motion for Preliminary Injunctive Relief by this Court," filed October 21, 2003. Filed in response is "Defendants Jay and Eudice Grossman's Opposition to Plaintiffs' Motion for Preliminary Injunctive Relief."

Procedural History

Plaintiffs Robert M. Davidson and Vanessa E. Komar, proceeding pro se, filed "Plaintiff's Original Complaint" on February 19, 2003, against 22 named corporate and individual Defendants. The 191 page original complaint alleged 21 counts.

On March 11, 2003, Plaintiffs filed a 144 page Rico Case Statement, with several exhibits attached.

On April 30, 2003, Plaintiffs filed a 328 page First Amended Complaint, against the same 22 named Defendants, alleging 17 separate counts.

On June 6, 2003, Defendants Grossman appeared and filed "Defendants Jay and Eudice Grossman's Motion to Dismiss Pursuant to Rule 8, Federal Rules of Civil Procedure."

On July 1, 2003, the Court granted Defendants Jay and Eudice Grossman's Motion to Dismiss Pursuant to Rule 8 based on the Court's finding "that the prolixity of the First Amended Complaint renders the pleading incomprehensible."

This matter was also stayed pursuant to the Notice of filing of Bankruptcy Petition and of the Automatic Stay filed by Defendants Vivra, Inc., Magellan Specialty Health, Inc. and Allied Special Care Services, LLC.

Plaintiffs were granted leave to file a Second Amended Complaint upon the lifting of the automatic stay in compliance with the pleading requirements of the Federal Rules of Civil Procedure and in accordance with the provisions of the Court's Order, specifically Rule 8(a)(2), which requires a complaint to include only "a short and plain statement of the claim," and Rule 9(b), which requires that "[I]n all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity."

Plaintiffs were warned that "[a]lthough the pleadins of pro se litigants are construed liberally, pro se litigants are nevertheless bound by the federal and local rules of procedure. See Ghazali v. Moran, 46 F.3d 52, 54 (9th Cir. 1995)."

Discussion

Although this cause of action is still under the automatic stay provision pursuant to the filing of a bankruptcy provision, Plaintiffs filed the present motion seeking injunctive relief.

There is no operative complaint before the Court.

Plaintiffs' motion seeks "preliminary injunctive relief from this Court in the form of:"

> (a) an Order by this Court for a Stay of Pima County Superior Court Case # 333954, pending final adjudication of the federal cause of action (Case #03-111) from which it arises,
>
> (b) an Order by this Court for a Stay of the award of Costs [$211.01] and Attorney's Fees [$6,767.50] to the Grossmans in Arizona Court of Appeals Case # 2 CA-CV

02-0051, pending final adjudication of the federal cause of action (Case # 03-CV 110) from which it arises, and
(c) an Order by this Court for a Stay of the award of Costs [$82.00] and Attorney's Fees [$1,710.00] to the Grossmans in Arizona Supreme Court Case #CV-03-0148-PR, pending final adjudication of the federal cause of action (Case # 03-CV 110) from which it arises, and
(d) an Order for any other relief this Court deems appropriate.

Plaintiffs base their argument in their motion for injunctive relief on the following:

> Plaintiffs (the Davidsons) will suffer irreparable injury if Pima County Superior Court Case # 333954 proceeds to trial prior to final judgment upon the merits of the federal cause of action (Case # 03CV-110-TUC-FRZ) *from which it arises*. PIMA County Superior Court Case # 333954 *arises from* the same nucleus of operative facts alleged by the Davidsons in US District Court Case #03CV100TUC alleged by the Davidsons in US District Court Case # 03CV100TUC FRZ. There is a distinct risk of issue preclusion or claim preclusion, if Pima County Superior Court Case # 333954 proceeds to trial prior to the final judgment upon the merits of 03CV-110-TUC-FRZ.

Although Plaintiffs' initial filings were incomprehensible, it is clear to the court that this action, in its entirety, must be dismissed based on the doctrine of abstention which precludes federal court interference with pending sate judicial proceedings. It is evident, based on Plaintiffs' admissions and requests for relief, as set forth in their motion for preliminary injunction, that this action was filed in federal court, on the premise of supplemental jurisdiction and federal question, to circumvent the ongoing state court proceedings, an abuse of federal judicial resources.

It is clear that this Court lacks jurisdiction over the matters asserted in this federal action and the relief requested by Plaintiffs in

their motion for injunctive relief. The Court need not address the principles of judicial estoppel which also preclude the filing of this action in federal court.

The Court thereby invokes the doctrine of abstention pursuant to Younger v. Harris, 401 U.S. 37, 91 S.Ct. 746 (1971), in which the Supreme Court "espouse[d] a strong federal policy against federal-court interference with pending state judicial proceedings." H.C. v. Koppel, 203 F.3d 610, 613 (9th Cir. 2000) (quoting Middlesex County Ethics Committee v. Garden State Bar Ass'n., 457 U.S. 423, 431, 102 S.Ct. 2515, 2521 (1982)). "Absent extraordinary circumstances, Younger abstention is required if the state proceedings are (1) ongoing, (2) implicate important state interests, and (3) provide the plaintiff an adequate opportunity to litigate federal claims." Id.

Plaintiffs have an adequate state forum in which to pursue the issues presented.

Based on the foregoing,

IT IS HERBY ORDERED that this case is **DISMISSED** with all parties to bear their own costs.

IT IS FURTHER ORDERED that all other pending matters are **DENIED** as moot.

There shall be no further filings in this action.

DATED this 20th day of November, 2003.

/s FRANK R. ZAPATA
United States District Judge

APPENDIX C

___FILED ___LODGED
___RECEIVED___COPY
FEB 2 2004
CLERK US DISTRICT COURT
DISTRICT OF ARIZONA
BY_____DEPUTY

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

Robert M. Davidson, Vanessa E. Komar,
Plaintiffs,

vs.

Michael J. Meehan; Quarles & Brady Streich Lang

Defendants

No. CV 03-580 TUC FRZ
ORDER

The present action commenced with the filing of Plaintiffs' Original Complaint & Application for Injunctive Relief against Defendants Michael J. Meehan and Quarles & Brady Streich Lang. The pleading alleges, inter alia that "[t]he Arizona state courts...have effectively stripped the Davidsons of their former attorney of record...without Due Process or Equal Protection, in violation of the Contract Clause, Takings Clause, and 14th Amendment of the U.S. Constitution."[1]

Plaintiffs' claims appear to arise from a state court ruling granting a motion to withdraw as attorney of record in state court proceedings, filed by Defendant Meehan, who had been retained to represent in the state court action. Plaintiffs' complaint refers repeatedly to facts and

[1] Plaintiffs' Original Complaint & Application for Injunctive Relief, Page 5,¶ 24.

allegations arising out of state court proceedings and a previously filed district court action, which was dismissed on November 23, 2003, four days after the filing of this action on November 20, 2003, in which Plaintiffs had similarly moved for injunctive relief.

Defendants filed a Motion to Dismiss in response to Plaintiffs' Original Complaint & Application for Injunctive Relief on December 22, 2004, now before the Court for consideration.

Defendants move the court to dismiss the present case based on their contention that "there is no Constitutional right to counsel in civil case" and, "...original subject matter jurisdiction for this case is not present." Defendants conclude that "[a]s a result, this Court cannot retain supplemental jurisdiction over plaintiffs' state law based claims and thus, the entire case should be dismissed."

Plaintiffs filed their Objection to Motion to Dismiss in response to Defendants' motion, contending that they "sought relief for this irrevocable injury in their Motion for Preliminary Injunctive Relief in U.S. District court Case 03CV-110 TUC-FRZ...presently on appeal to the 9th Circuit Court of Appeals..."

Defendants' motion to dismiss addresses Plaintiffs' cause of action on the merits of the claims asserted, arguing that Plaintiffs have failed to allege the infringement of a constitutionally protected right, specifically a constitutional right to counsel in a civil case, and therefore, there is no basis for federal subject matter jurisdiction. The Court finds however, that Plaintiffs' cause of action has not been brought properly before this Court.

The Court dismissed Plaintiffs' previous action by Court order and judgment, filed November 24, 2003, under the doctrine of abstention pursuant to Younger v. Harris, 401 U.S. 37, 91 S.Ct. 746 (1971), in which Plaintiffs moved for injunctive relief, alleging:

Plaintiffs (the Davidsons) will suffer irreparable injury if Pima County Superior Court Case # 333954 proceeds to trial prior to final judgment upon the merits of the federal cause of action (Case # 03CV-110-TUC-FRZ) *from which it arises*. PIMA County Superior Court Case # 333954 *arises from* the same nucleus of operative facts alleged by the

Davidsons in US District Court Case # 03CV100TUC FRZ.

In dismissing the previous action, the Court found that "[a]lthough Plaintiffs' initial filings were incomprehensible, it is clear to the Court that this action, in its entirety, must be dismissed based on the doctrine of abstention which precludes federal court interference with pending state judicial proceedings."

The Court further held that ""[I]t is evident, based on Plaintiffs' admissions and requests for relief, as set forth in their motion for preliminary injunction, that this action was filed in federal court, on the premise of supplemental jurisdiction and federal question, to circumvent the ongoing state court proceedings, an abuse of federal judicial resources." The Court further explained that it "need not address the principles of judicial estoppel which also preclude the filing of this action in federal court" and that "[I]t is clear that this Court lacks jurisdiction over the matters asserted in this federal action and the relief requested by Plaintiffs in their motion for injunctive relief."

The Court concluded that Plaintiffs have an adequate state forum in which to pursue the issues presented. Plaintiffs filed a notice of appeal.

In the present action, Plaintiffs appear to be attempting to raise issues arising from the same cause of action and events that originated in the Arizona state courts. Plaintiffs' Original Complaint & Application for Injunctive Relief fails to comply with the requirements of Rule 8(a)(2), which requires a complaint to include only "a short and plain statement of the claim," and Rule 9(b), which requires that "[I]n all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity." These requirements were set forth by Court prder in thprevious action, CV 03-110 TUC FRZ, along with the warning that "[although the pleadings of pro se litigants are construed liberally, pro se litigants are nevertheless bound by the federal and local rules of procedure." See Ghazali v. Moran, 46 F.3d 52, 54 (9th Cir. 1995). Plaintiffs' Original Complaint & Application for Injunctive Relief includes, but is not limited to, the following allegations:

Opposing counsel in Pima County Case 333954 inappropriately aligned their interests with those of Mr Meehan and Q&BSL during the Davidsons' appellate action to the Arizona court of Appeals as is amply demonstrated by their Answer Brief and Opposition to Petition for Review. The *possibility* of a prior association between any of the counsel of the firm Quarles & Brady LLP [in any state or federal jurisdiction] and any of the named defendants [or their Counsel] in U.S. District Court Case # 03CV-110-TUC-FRZ, is of grave concern to the Davidsons. The Davidsons pray for this court to allow discovery on this question. Such a question is readily subject to discovery, assuming that any records documenting such an association have not been destroyed. This is particularly relevant at this time because a number of the named corporate defendants [Vivra Inc, Magellan Specialty Health Inc, Allied Specialty Care Services Inc, and Health Technologies Inc] in Case #03CV-110-TUC-FRZ are presently in the process of disposing of their assets [*and records?*] in a Chapter 11 Bankruptcy proceeding filed on March 11, 2003, in the U.S. Bankruptcy Court, Southern District of New York [In Re: Magellan Health Services Inc, Case No. 03-40515 (PCB), Jointly Administered]. Case #03CV-110-TUC-FRZ is presently stayed by the filing for Automatic Stay under the Bankruptcy Code.

As of the filing of this complaint, Mr. Meehan appears no longer to be an associate of the law firm Quarles & Brady Steich Lang. According to the State Bar of Arizona Member Finder, Mr. Meehan *now* works for the law firm, The Law Offices of Michael J. Meehan, and he appears to *now* no longer be an associate of Quarles 7 Brady Steich Lang. Thus, Mr. Meehan is an attorney who has moved between law firms, *frequently*. The plaintiffs will produce evidence at trial that this movement between law firms [during Mr. Meehan's attorney-client relationship with the Davidsons] inured to detriment of his clients (the Davidsons) in Pima County Case #333954, in more ways than one. This movement between law firms was not part of the benefit bargained-for when the davidsons retained Mr. Meehan as their legal counsel in Pima County Case #333954.[2]

[2] Plaintiffs' Original Complaint & Application for Injunctive Relief, ¶¶39,40, 41.

As evidence by Plaintiffs' Exhibits in Support of Objection to Motion to Dismiss, this case centers around the state court controversies the Plaintiffs tried to raise in their previous federal action. The Court again, finding that Plaintiffs have an adequate state forum in which to pursue the issues presented, invokes the doctrine of abstention pursuant to Younger v. Harris, 401 U.S. 37, 91 S.Ct. 746 (1971), which "espouse[s] a strong federal policy against federal-court interference with pending state judicial proceedings." H.C. ex rel. Gordon v. Koppel, 203 F.3d610, 613 (9th Cir.2000) (quoting Middlesex County Ethics Committee v. Garden State Bar Ass'n., 457 U.S. 423, 431, 102 S.Ct. 2515, 2521 (1982). The Court does not find extraodinary circumstances to intercede in the ongoing state court proceedings in which Plaintiffs have adequate opportunity to litigate any alleged federal claims. See Id.

Notwithstanding this finding, as Defendants assert, "it is well-established that there is generally no constitutional right to counsel in civil cases. " United State v. Sardone, 94 F.3d 1233, 1236 (9th Cir 1996) (citing Hedges v. Resolution Trust Corp., 32 F.3d 1360, 1363 (9th Cir. 1994) cert. denied, 514 U.S. 1082, 115 S.Ct. 1792 (1995)).

Based on the foregoing,
IT IS HEREBY ORDERED that this case is **DISMISSED** with all parties to bear their own costs.

Judgment shall be entered accordingly.

DATED this 30th day of January, 2004.

/s FRANK R. ZAPATA
United States District Judge

APPENDIX D

FILED
PATRICIA A. NOLAN
CLERK, SUPERIOR CT
April 29, 2004 (11:27)
By: Kitty Vroman

ARIZONA SUPERIOR COURT, PIMA COUNTY

JUDGE: HON. JANE L. EIKLEBERY CASE NO. **C-333954**
COURT REPORTER: NONE DATE: April 29, 2004

JAY GROSSMAN and EUDICE GROSSMAN, h/w,

Plaintiffs,

vs.

ROBERT MICHAEL DAVIDSON and VANESSA DAVIDSON, a/k/a VANESSA E. KOMAR, h/w

Defendants

ROBERT MICHAEL DAVIDSON and VANESSA E. KOMAR, h/w

Defendants/Counterclaimants,

v.

JAY GROSSMAN and EUDICE GROSSMAN, h/w,

Plaintiffs/Counterdefendants.

MINUTE ENTRY

IN CHAMBERS RULINGS RE: DEFENDANTS' MOTION TO AMEND DEFENDANTS' ANSWER, TO ADD COUNTER CLAIMS AND ADD PARTIES, PLAINTIFFS' MOTION TO REQUIRE DEFENDANTS TO PAY PLAINTIFFS FOR COSTS AND ATTORNEYS' FEES ASSESSED FOR FRIVOLOUS APPEALS, DEFENDANTS' MOTION TO ENLARGE TIME

TO FILE RULE 26.1 DISCLOSURE STATEMENT AND DEFENDANTS' MOTION TO ENLARGE TIME FOR THE DISCOVERY DEADLINE

The Court has reviewed all of the motions, oppositions and replies submitted. The complaint in this action was filed on July 2, 1999. The case is set for trial on October 13, 2004. On January 20, 2004, the parties were ordered to comply with Rule 26.1 on or before Friday, March 19, 2004. The discovery deadline was set for Friday, April 30, 2004.

Kitty Vroman, Deputy Clerk
By George Hofmeister, J.A.A.

Defendants belatedly seek to unnecessarily enlarge the scope of this action to include claims and parties, some, if not all, of which are presently before the 9th Circuit Court of Appeals. Defendant Robert Michael Davidson was advised of the trial date, the deadline for complying with Rule 26.1 and the discovery deadline during the status conference of January 20, 2004. The motion to enlarge the deadlines during the status conference of January 20, 2004. The motion to enlarge the deadlines was filed after the disclosure deadline. Defendants' motions appear to be filed for purposes of delay and harassment. To allow the extensive proposed amendments to the answer and the counterclaim would greatly prejudice the plaintiffs given that the trial date is set for October 13, 2004. This case has been pending for almost five years and absent extraordinary and unforeseen circumstances, the trial date will not be continued.

Defendants' motion to amend their answer to add counterclaims and parties and defendants' motion to enlarge the time to comply with Rule 26.1 and to extend the discovery deadline are hereby denied.

Plaintiffs' motion for sanctions is hereby denied at this time with leave granted to refile the motion if warranted. Defendants are warned that filing groundless motions, taking actions primarily for delay or harassment, and attempts to unreasonably expand or delay the proceeding may result in the imposition of sanctions including , but not limited to, the striking of their counterclaim, the striking of their answer, entering of a default against them, and an award of additional attorneys' fees and costs to plaintiff.

Defendants delivered a copy of their disclosure statement to the Court. Defendants are advised that disclosure statements are neither filed with the clerk or copied to the court.

cc: Bruce Heurlin, KARP, HEURLIN & WEISS, P.C.
Robert Davidson & Vanessa Komar, P.O. Box 1785,
Kilgore, TX 75663-1785

Kitty Vroman, Deputy Clerk
By George Hofmeister, J.A.A

APPENDIX E

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

FILED BY CLERK
FEB 27 2003
COURT OF APPEALS
DIVISION TWO

JAY GROSSMAN and EUDICE GROSSMAN, husband and wife,
Plaintiffs/Appellees,

v.

ROBERT MICHAEL DAVIDSON,
Defendant/Appellant.

2 CA-CV 2002-0051
DEPARTMENT B

MEMORANDUM DECISION
Not for Publication
Rule 28, Rules of Civil
Appellate Procedure

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY
Cause No. 333954
Honorable Jane L. Eikleberry, Judge

APPEAL DISMISSED

Karp, Heurlin & Weiss, P.C.
By Bruce R. Heurlin
Tucson
Attorneys for Plaintiffs/Appellees

Robert M. Davidson
In Propria Persona
Kilgore, Texas

D R U K E, Presiding Judge

¶1 Jay and Eudice Grossman sued Robert and Vanessa Davidson for defamation, slander, and other related counts. Four months before trial, the Davidsons' attorney moved to withdraw as counsel and to continue the trial. The Davidsons did not respond to the motion and the Grossmans had no objection to it. On January 11, 2002, the trial court

entered an order granting the motion to withdraw and rescheduled the trial. On February 13, Robert Davidson filed a notice of appeal "from the order made and entered in this action on the 11th day of January, 2002." For the reasons that follow, we dismiss the appeal for lack of jurisdiction.

¶2 In a civil case, "the right to appeal is not absolute but exists only by statute." *Southern Cal. Edison Co. v. Peabody W. Coal Co.*, 194 Ariz. 47, ¶16, 977 P.2d 769, ¶16 (1999); *see also In re Pima County Juvenile Action No. S-933*, 135 Ariz. 278, 660 P.2d 1205 (1982) (substantive right to appeal created only by constitution or statute). Civil appeals are governed by A.R.S. § 12-2101, which limits this court's jurisdiction to those matters set forth in the statute. See Ariz. Const. Art. VI, § 9; A.R.S. § 12-120.21; *Truck Ins. Exch. V. State Compensation Fund,* 138 Ariz. 116, 117, 673 P.2d 314, 315 (App. 1983) ("[T]he right to appeal and orders which are reviewable on appeal are strictly statutory."); *Campbell v. Arnold*, 121 Ariz. 370, 590 P.2d 909 (1979) (court of appeals only has jurisdiction given by statute).

¶3 The Grossmans point out that the order granting counsel's motion to withdraw does not come "within any of the categories of appealable orders." In response, Davidson asserts that this appeal comes within § 12-2101(D), which permits an appeal "[f]rom any order affecting a substantial right made in any action when the order in effect determines the action and prevents judgement from which an appeal might be taken." He argues that "[t]he substantial rights in this appeal are the Constitutionally-protected rights to Due Process, Equal Protection, and right to Contract" and that "[t]he order appealed from, in effect, determine[d] the action." (Emphasis omitted.)

¶4 Although we might agree that the rights to which Davidson refers are substantial, we cannot agree that the trial court's order permitting

---

[1]Both the notice of appeal and the opening brief state that Robert Davidson is "representing" the defendants. He may represent himself, but because he is not an attorney admitted to the practice of law, he cannot represent his wife. *See Haberkorn v. Sears, Roebuck & Co.*, 5 Ariz. App. 397, 427 P.2d 378 (1967)

his counsel to withdraw determined the action that the Grossmans filed against him. That "order did not finally dispose of the case, leaving no question open for judicial determination." *Eaton v. Unified Sch. Dist. No. 1 of Pima County,* 122 Ariz. 391, 392, 595 P.2d 183, 184 (App. 1979). The order simply allowed Davidson's attorney to withdraw his reprentation and continued the date for a trial on the merits. The order was, in fact, interlocutory, this is, "interim or temporary, not constituting a final resolution of the whole controversy." *Black's Law Dictionary 819* (7th ed. 1999). And interlocutory orders are generally noappealable. *See Southern Cal Edison*, 194 Ariz. 47, ¶16, 977 P.2d 769, ¶16 (legislature's express listing in § 12-2101 of appealable judgements and orders makes clear that "most *interlocutory orders*... are not appealable"); *Security Gen. Life Ins. Co. v. Superior Court*, 149 Ariz. 332, 333, 718 P.2d 985, 986 (1986) (order disqualifying counsel from representing party "is not a final order and in therefore not appealable"); *Riley, Hoggatt & Suagee, P.C. v. Riley*, 165 Ariz. 138, 796 P.2d 940 (App. 1990) (order denying counsel's motion to withdraw representation not appealable); *Eaton* (§ 12-2101(d) does not permit appeal from interlocutory order allowing case to proceed as class action). Accordingly, we conclude that the trial court's order allowing Davidson's counsel to withdraw is a nonappealable interlocutory order.

¶5 But even is we were to assume that the order is appealable, because Davidson did not file his notice of appeal until February 13, it was not filed within the thirty days required by Rule 9(a), Ariz. R. Civ. App. P., 17B A.R.S. The relevant part of Rule 9(a) states that a "notice of appeal... shall be filed with the clerk of the superior court not later than 30 days after the entry of judgement from which the appeal is taken." Rule 2(d), Ariz. R. Civ. App. P., defines "[j]udgement" as "any appealable order, weather denominated an order, a judgement, a decree, or otherwise." Thus, even if the order were appealable, we would still lack jurisdiction to review it because Davidson failed to timley file the notice of appeal. *See Butler Products Co. v. Roush*, 145 Ariz. 32, 32, 699 P.2d 906, 906 (App. 1984) ("Appellate courts do not have jurisdiction to consider appeals which are not timely filed."); *Pina*

County No. S-933 (failure to file timely appeal deprives appealate court of jurisdiction).

¶6 For the forgoing reasons, we dismiss for lack of jurisdiction Davidson's appeal from the trial court's January 11 interlocutory order granting his attorney's motion to withdraw as counsel. We also grant the Grossmans costs and attorney's fees on appeal, finding, for the reasons set forth in the answering brief, that Davidson filed a frivolous appeal. Ariz. R. Civ. App. P. 25, 17B A.R.S. Costs and attorney's fees will be awarded to the Grossmans upon their compliance with Rule 21, Ariz. R. Civ. App. P.

/s WILLIAM E. DRUKE, Presiding Judge

CONCURRING;

/s PHILIP G. ESPINOSA, Chief Judge

/s JOHN PELANDER, Judge

APPENDIX F

SUPREME COURT OF ARIZONA

FILED
SEP 15 2003
NOEL K. DESSAINT
CLERK SUPREME COURT

JAY GROSSMAN
and EDUICE GROSSMAN,
husband and wife,

Plaintiff/Appellee,

v.

ROBERT MICHAEL DAVIDSON

Defendant/Appellant.

Arizona Supreme Court
No. CV-03-0148-PR
Court of Appeals
Division Two
No. 2 CA-CV 02-0051
Pima County Superior Court
No. 333954

ORDER

On August 8, 2003, this Court issued a minute letter granting Attorneys' Fees to Appelles Jay Grossman and Eudice Grossman. A "Plaintiffs-Appellees' Verified Itemized Statement of Costs and Attorney's Fees" was filed on August 22, 2002. Pursuant to Rule 21, Rules of Civil Appellate Procedure and this Court's minute letter of August 8, 2003, and the Clerk having been authorized to tax costs and attorneys fees, and no objection having been received from Appellant Robert Michael Davidson.

IT IS ORDERED granting Appellees Jay Grossman and Eudice Grossman attorney's fees in the amount of One Thousand Seven Hundred Ten and 00.100 Dollars ($1,710.00) and costs in the amount of Eighty-Two and 00/100 Dollars ($82.00).

DATED this 15th day of September, 2003.

/s NOEL K. DESSAINT
Clerk of the Court

TO:
Bruce R. Heurlin, Karp Heurlin & Weiss PC
Robert Michael Davidson
rd

APPENDIX G

__FILED ___LODGED
__RECEIVED ___COPY
APR 27 2004
CLERK US DISTRICT COURT
DISTRICT OF ARIZONA DEPUTY

FILED
APR 16 2004
CATHY A CATTERSON, CLERK
U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ROBERT M. DAVIDSON
Plaintiff - Appellant,
v.
VIVRA INC.; ET AL.,
Defendants - Appellees.

No. 03-17342

D.C. No. CV-03-00110-FRZ
District of Arizona, Tucson

ORDER

The Parties have stipulated to the dismissal of this case under the Federal Rule of Appellate Procedure 42(b). The case is dismissed as to appellees Vivra, Inc. Magellan Specialty Health, Inc., and Allied Specialty Care Services, LLC f/k/a Allied Specialty Care Serviced, Inc. ONLY.

Costs shall be allocated pursuant to the terms of the stipulation.

A certified copy of this order sent to the district court shall act as and for the mandate of this court as to appellees Vivra, Inc. Magellan Specialty Health, Inc., and Allied Specialty Care Services, LLC f/k/a Allied Specialty Care Services, Inc. ONLY.

For the Court

CATHY A. CATTERSON
Clerk of the Court

/sLorela Bragado-Sevillena
Deputy Clerk

A TRUE COPY
CATHY A. CATTERSON
CLERK OF COURT
ATTEST
APRIL 16 2004
BY:/sDonna Gilmore
DEPUTY CLERK

Ninth Circuit Rule 27-7/ Advisory Note
to Rule 27 and Ninth Circuit Rule 27-10

pro 4.12